Supreme Court, U.S.
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No. 08-578

IN THE

Supreme Court of the United States

JAMES A. KAY, JR.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 9(b) of the Administrative Procedure Act ("APA") provides:

> When the licensee has made timely and sufficient application for a *renewal or a new license* in accordance with agency rules, a license with respect to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c) (emphasis added).

In 1994, Petitioner filed two applications with the Federal Communications Commission ("FCC" or "Commission"), each one seeking consent to the assignment of the license for an existing mobile radio system station to Petitioner. The license terms expired while the assignment applications were pending. After retaining the assignment applications on file for an additional four years, the Commission dismissed without hearing on the grounds that the underlying licenses had expired. Under the procedures and regulations in effect at the time, the Commission made no significant distinction, whether in procedural requirements or substantive consideration, between assignment versus new applications for licenses of these type. Petitioner therefore asserted that the assignment applications were "renewal or new" applications within the meaning of Section 9(b) of the Administrative Procedure Act, thereby continuing the underlying authority, and were improperly dismissed.

The questions presented are:

1. Does Section 9(b) of the Administrative Procedure Act apply equally to license assignment and new applications in services where the agency's procedures and substantive considerations for the two types of applications are virtually indistinguishable from one another in any significant sense?

2. Was it improper for the Court of Appeals, in addressing this matter, to accept a rationale proffered by FCC appellate counsel that was not articulated by the agency itself in the decisions being appealed?

3. Is it unlawfully discriminatory for the agency to apply different standards to assignment and new applications in services where the agency's procedures and substantive considerations for the two types of applications are virtually indistinguishable from one another in any significant sense?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner, James A. Kay, Jr., is an individual who presently holds land mobile licenses authorized by the FCC under 47 C.F.R. Part 90. The FCC is the agency of the United States authorized by 47 U.S.C. §§ 308, 309 & 310(d) to receive and process applications for licenses to construct and operate such land mobile radio systems, as well as applications to modify, renew, or assign such licenses.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	9
A. This Case Involves a Key Provision of the Administrative Procedure Act.	9
B. The Decision Below Violates this Court's *Chenery Doctrine*, a Fundamental Principle in Judicial Review of Agency Decisions.	12

Contents

Page

C. The FCC Action is Unlawfully Discriminatory and Applies Unequal Regulatory Treatment to Similar Situated Applicants 14

CONCLUSION 17

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided May 23, 2008 ..... 1a

Appendix B — Order Of The Federal Communications Commission Released June 28, 2005 ..... 5a

Appendix C — Order On Reconsideration Of The Federal Communications Commission Released February 20, 2004 ..... 13a

Appendix D — Memorandum Opinion And Order Of The Federal Communications Commission Released April 17, 2003 ..... 19a

Appendix E — Order Of The Federal Communications Commission Released November 14, 2001 ..... 28a

Appendix F — Order Of The Federal Communications Commission Released February 11, 2003 ..... 34a

Appendix G — Memorandum Opinion And Order Of The Federal Communications Commission Released April 1, 2002 ..... 41a

Appendix H — Notice Of Dismissal Of The Federal Communications Commission Dated December 4, 2000 ..... 52a

Appendices

Page

Appendix I — Notice Of Dismissal Of The Federal Communications Commission Dated September 25, 2000 ..... 54a

Appendix J — Orders Of The United States Court Of Appeals For The District Of Columbia Circuit Denying Petition For Panel Rehearing And Petition For Rehearing En Banc Filed July 31, 2008 ..... 56a

Appendix K — Principal Statutes & Regulations Relied Upon 60a

Appendix L — Excerpts From FCC Form 574 Instructions (August 1989) 77a

TABLE OF CITED AUTHORITIES

Page

Opinions

U.S. Supreme Court

Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) 15

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 13

Pan-Atlantic Corp. v. Atlantic Coast Line, 353 U.S. 436 (1957) 10

SEC v. Chenery Corp., 318 U.S. 80 (1943) 13

SEC v. Chenery Corp., 332 U.S. 194 (1947) 13

D.C. Circuit

Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993) 14

Lutheran Church–Missouri Synod v. FCC, 154 F.3d 487 (D.C. Cir. 1998) 14

Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) 14

Miami MDS Co. v. FCC, 14 F.3d 658 (D.C. Cir. 1994) 12

Tel. & Data Sys. v. FCC, 19 F.3d 655 (D.C. Cir. 1994) 14

Cited Authorities

Page

Other Circuits

California v. FCC, 905 F.2d 1217 (9th Cir. 1990) .. 14

FCC Decisions

Daniel R. Goodman, Receiver, 13 FCC Rcd 21944 (1998) 16

Hawaiian Wireless Partners, 11 FCC Rcd 21192 (WTB 1996) 16

Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees, 6 FCC Rcd 4929 (1991) ... 16

Cited Authorities

Page

Statutes & Regulations

Administrative Procedure Act,
5 U.S.C. § 500 *et seq.* ..... *passim*

Section 9(b), 5 U.S.C. § 558(c) ..... i, ii, 3, 9, 10

Communications Act of 1934, as amended,
47 U.S.C. § 301 *et seq.* ..... *passim*

Section 308, 47 U.S.C. § 308 ..... iii, 3
Section 309(a), 47 U.S.C. § 309(a)-(e) .. iii, 3, 14, 15
Section 310(d), 47 U.S.C. § 310(d) .. iii, 3, 4, 11, 15

FCC Regulations .....

Section 90.119, 47 C.F.R. § 90.119 (1994) ... iii, 3, 5, 7

Miscellaneous

Sewell, Stephen F., *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277(1991) 15

FCC Form 574 Instructions (August 1989) 6, 16

Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 525 F.3d 1277. Appendix A at 1a.

The orders of the Court of Appeals denying panel rehearing and rehearing en banc are unreported. Appendix J at 56a and 58a, respectively.

The FCC Notice of Dismissal (September 25, 2000) with regard to Call Sign WNXR8980 is unreported. Appendix I at 54a.

The FCC Notice of Dismissal (December 4, 2000) with regard to Call Sign WIK902 is unreported. Appendix H at 52a.

The FCC Memorandum Opinion and Order (DA 02-739; April 1, 2002) denying reconsideration of the dismissal of the assignment application for Call Sign WIK902 is reported at 17 FCC Rcd 5951 (WTB 2002). Appendix G at 41a.

The FCC Order (FCC 03-27; Feb. 11, 2003) denying review with regard to Call Sign WIK902 is reported at 18 FCC Rcd 2366 (2003). Appendix F at 34a.

The FCC Order (DA 01-2634; November 14, 2001) denying reconsideration of the dismissal of the assignment application for Call Sign WNXR890 is reported at 16 FCC Rcd 20183 (WTB 2001). Appendix E at 28a.

The FCC Memorandum Opinion and Order (FCC 03-84; April 17, 2003) denying application for review with regard to Call Sign WNXR890 is reported at 18 FCC Rcd 7585 (2003). Appendix D at 19a.

The FCC Order on Reconsideration (DA 04-443; February 20, 2004) denying review with regard to Call Sign WNXR890 is reported at 19 FCC Rcd 2938 (WTB 2004). Appendix C at 13a.

The FCC Order (FCC 05-131; Jun. 28, 2005) denying further reconsideration with regard to Call Sign WNXR890 is reported at 20 FCC Rcd 12228 (2004). Appendix B at 5a.

JURISDICTION

The judgment of the District of Columbia Circuit was issued on June 28, 2005. Appendix. A . Timely petitions for panel rehearing and rehearing en banc were denied on July 31, 2008. Appendix J. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following authorities are set forth in Appendix K.

1. Sections 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c). Appendix K at 60a.

2. Section 308 of the Communications Act of 1934, as amended, 47 U.S.C. § 308. Appendix K at 61a.

3. Section 309, subsections (a) through (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a)-(e). Appendix K at 64a.

4. Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d). Appendix K at 71a.

5. Section 90.119 of the FCC Regulations (as in effect in 1994), 47 C.F.R. § 90.119 (1994), App. 310(d). Appendix K at 72a.

STATEMENT OF THE CASE

The case involves two separate application proceedings before the Federal Communications Commission ("FCC" or "Commission") that were consolidated for joint briefing and argument in the Court of Appeals. The facts and legal issues in each case are virtually identical.

Petitioner, James A. Kay, Jr., is an individual who, directly or indirectly, presently holds FCC licenses for land mobile radio systems in the Los Angeles area, authorized by the FCC under 47 C.F.R. Part 90. In 1994, Petitioner filed applications seeking FCC consent, pursuant to Section 310(d) of the Communications Act of 1934, as amended, , 47 U.S.C. § 310(d), to the assignment of two such licenses from other licensees to Petitioner.[1] Each of these application proceedings followed the same pattern, namely, the expiration dates for the license arrived while the assignment application was pending. The Commission nonetheless retained the application on file for another four years before eventually dismissing it on the grounds that the underlying license had expired and the former licensee

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1. On April 11, 1994, Kay filed an application for FCC consent to the assignment of the license for Conventional UHF Industrial/Business Pool (IG) Station WIK902 from Francisco M. Padilla to Kay (the "Padilla Assignment Application"). In a separate and unrelated proceeding, on June 7, 1994, Kay filed an application for FCC consent to the assignment of the license for Conventional 800 MHz Specialized Mobile Radio Service (GX) Station WNXR890 from Vince Cordaro to Kay (the "Cordaro Assignment Application").

therefore had nothing to assign.[2] Petitioner filed timely requests for agency reconsideration and review, all of which were dismissed or denied, App. 5a-51a, and the Court of Appeals upheld the agency on appeal. App. 1a-4a.

Under Commission procedures in effect at that time applications for Commission consent to the assignment of most Part 90 land mobile radio licenses, including those at issue here, consisted of two elements: (a) an FCC Form 574 to be completed and executed by the assignee; and (b) a letter from the assignor attesting to its intent to assign all interest in the specified authorization (or, alternatively, and FCC Form 1046 executed by the assignor/licensee). *Section 90.119(a)(4) of the FCC Regulations as in effect in 1994*, 47 C.F.R. § 90.119(a)(4) (1994). It is not disputed that the assignment applications filed by Petitioner properly followed these procedures and were acceptable when filed. The grounds for dismissals was the that expiration dates on the subject licenses arrived while the assignment applications were pending.

The FCC Form 574, now obsolete, was in 1994 the standard application form used for Part 90 land mobile radio facilities licensing. The same information is

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2. On April 11, 1994, when the Padilla Assignment Application was filed, the license for Station WIK902 bore an expiration date of June 13, 1996. The FCC dismissed the assignment application on December 4, 2000, nearly four and a half years after the expiration date. App. 52a. On June 7, 1994, when the Cordaro Assignment Application was filed, the license for Station WNXR890 bore an expiration date of November 4, 1996. The Commission dismissed the application on September 25, 2000, nearly four years after the expiration date. App. 54a.

required whether the form is being used to apply for a new authorization or to take assignment of an existing authorization, the only difference being that, with respect to an assignment, the "Assignment" box would be checked at Item 32, the "previous call sign" would be entered at Item 36, and the letter or FCC Form 1046 executed by the licensee would be attached.

The assignor's portions of an assignment applications tendered on FCC Form 574 was virtually indistinguishable in form and substance from an application for new facilities. This was not merely a procedural fluke or an administrative coincidence, but rather seems to have been deliberate. The similarity between an assignment versus a new application is explicit in the Commission's detailed instructions for completing the FCC Form 574. The following guidance appears under the section labeled *Item 32 – Reason for Filing*:

> Assignment of Authorization. . . . Prepare the application in your own name and complete it in the same manner as for a new station with all questions answered and include a detailed statement of your eligibility for Item 31.

FCC Form 574 Instructions. App. 78a. The form itself asks of for a comprehensive listing of station technical parameters, *e.g.*, geographic coordinates, site elevation, antenna and support structure height, operating frequencies, emission designators, output and effective radiated power, etc.

The instructions go on to emphasize the "newness" of the assignee's application on FCC Form 574 vis-à-vis the assignor's existing authorization:

> Include a letter from the assignor meeting the requirements of the Commission's Rules. For your convenience, FCC Form 1046, "Assignment of Authorization" may be obtained from any Commission office for this purpose."

App. 78a. The phrase, "requirements of the Commission's Rules," refers to the 1994 version of Section 90.119(b)(4) of the FCC Regulations which provides, in pertinent part:

> For the Commission's consent to the assignment of an authorization . . . , the application shall be accompanied by a letter from the assignor setting forth his desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and that the assignor will submit his current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

47 C.F.R. § 90.119(a)(4) (1994). The FCC Form 1046 itself includes the following statement placed conspicuously above the space where the licensee/assignor is to date and sign the document:

> My authorization will be submitted to the Commission for cancellation upon completion of the assignment. This certifies that the

> assignee intends *to continue the activity* for which I demonstrated original eligibility.

Certification, FCC Form 1046, Assignment of Authorization (emphasis added), contained in each of the assignment applications filed with the FCC.

These procedures transcend the mere clerical assignment of an existing authorization from one party to another. While couched in terms of a license assignment, the assignee is asked to prepare and submit a comprehensive self-contained application to authorize the facilities in its own name, upon the grant of which, the assignor is asked to cancel its own license. The "new" license issued based on the Form 574, is expressly intended to authorize the assignee "to continue the activity for which" the assignor had been previously licensed. When seen in this light, the FCC Form 574 as used in a 1994 license assignment application unmistakably emerges as an "application for a renewal or a new license . . . with respect to an activity of a continuing nature."

REASONS FOR GRANTING THE PETITION

A. This Case Involves a Key Provision of the Administrative Procedure Act.

Section 9(b) of the Administrative Procedure Act ("APA") provides, in pertinent part:

> When the licensee has made timely and sufficient application for a renewal *or a new license* in accordance with agency rules, a license with respect to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558(c) (emphasis added). Each of the FCC applications subject to this appeal was entitled to the protection of this statutory provision, and was therefore improperly dismissed.

The Supreme Court has explained the circumstances in which this provision applies, essentially identifying four elements, as follows:

(1) "[T]here must be a license outstanding;"

(2) "it must cover activities of a continuing nature;"

(3) "there must have been a timely and sufficient application to continue the existing operation; and"

(4) "the application for the new or extended license must not have been finally determined."

Pan-Atlantic Corp. v. Atlantic Coast Line, 353 U.S. 436, 439 (1957). There is no question that the first, second, and fourth elements are satisfied in this case. Each of the licenses in question was outstanding and in force at the time the applicable assignment of license application was filed; each authorized activities of a continuing nature; and up to the dismissals being challenged in this appeal, there had been no final action on "the application for the new or extended license." The dispute regards the third element, namely, whether the assignment of license application in each case properly constitutes "a timely and sufficient application to continue the existing operation." Petitioner submits that this question must be answered in the affirmative, based in no small measure on the Commission's own characterization of the applicable license assignment application procedures.

Under the land mobile regulations and licensing procedures applicable in 1994, an application for Commission consent to assignment of a license is properly deemed an "application for a renewal or a new license . . . with respect to an activity of a continuing nature," for purposes of Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c). The Commission's dismissal of the assignment applications on the grounds that the underlying licenses had expired was therefore improper. The relevant provision in Section 9(b), by its very terms, presumes a license that is beyond its authorized term. The Commission's

rejection of the assignment applications because they are not specifically "renewal" applications too narrowly reads the statute, which expressly includes, in addition to renewals, "application[s] for . . . new license[s]."[3]

The Court of Appeals also failed to follow its own precedent regarding interpretation of Section 9(b) of the Administrative Procedure Act. The FCC had asserted below that Section 9(b) does not preserve an authorization that expires on its own terms. But when the FCC advanced essentially the same argument in a prior case, the Court of Appeals rejected it.

> [W]e reject a view of [Section 9(b) of the APA] offered by the [Federal Communications] Commission, that is plainly wrong. Citing language from . . . *Atlantic Richfield Co. v. United States* . . . , the Commission argues that the provision affords no protection to a license that expires by its own terms. . . . [T]he third sentence of § 558(c) supplies continuity in instances where a licensee is seeking "renewal or a new license" and the agency has not gotten around to the issue. Thus *it plainly assumes a license that would naturally have lapsed in the absence of affirmative agency action—but for the intervention of § 558(c). The sentence would*

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3. The Commission's 1994 procedures are, moreover, entirely consistent with the applicable statutory requirements. Section 310(d) of the Communications Act provides that an assignment application must "be disposed of as if the proposed transferee or assignee were making [a new] application . . . for the permit or license in question," 47 U.S.C. § 310(d).

> *be a nullity if inapplicable to any permit that expires by its terms.*

Miami MDS Co. v. FCC, 14 F.3d 658, 659 (D.C. Cir. 1994) (emphasis added). That *Miami MDS* enunciates a correct reading of Section 9(b), and that the Commission's argument accepted by the Court of Appeals in this case is circular reasoning leading to an absurd result, is clear from the statute itself. Section 9(b) assumes the fact of a license expiration, *i.e.*, the arrival of a license expiration date, during the pendency of an application, and is designed precisely to preserve the effectiveness of the authority notwithstanding the expiration. This Court should clarify this principle, and reaffirm the correct reading presented in *Miami MDS*.

B. The Decision Below Violates this Court's *Chenery Doctrine*, a Fundamental Principle in Judicial Review of Agency Decisions.

The Court of Appeals decision was based in part on an argument advanced by FCC counsel on appeal, namely, that Section 9(b) of the Administrative Procedure Act does is restricted to "renewal or new applications" filed by the licensee to continue its existing license, and not to an application by proposed assignee. Apart from the fact that this argument is wrong on its merits, it may not properly be the basis for affirming the agency action because it was not articulate by the FCC itself in rendering its decision.

The Commission did not dismiss the applications because Petitioner was not the existing licensee, but rather because the assignment applications were not,

in its view, "renewal or new" applications within the meaning of Section 9(b), and because that sought the assignment of existing licenses rather than their replacement by new licenses. In other words, the Commission's rationale was based on the nature of the applications, not the identity of the applicants.

The FCC's argument therefore may not be invoked in this proceeding. "The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . For the courts to substitute . . . counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action. . . .

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

C. The FCC Action is Unlawfully Discriminatory and Applies Unequal Regulatory Treatment to Similar Situated Applicants

It is a well and long-established axiom that the FCC may not arbitrarily discriminate between similarly situated licensees in the adoption and application of its regulations, policies, and procedures. *Melody Music v. FCC*, 345 F.2d 730, 732-733 (D.C. Cir. 1965); *Tel. & Data Sys. v. FCC*, 19 F.3d 655, 657 (D.C. Cir. 1994). Indeed, all aspects of the Commission's exercise of its regulatory power is subject to the Constitutional requirement of equal protection of the laws. *E.g.*, *Lutheran Church–Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993).

In summarily dismissing the assignment applications, the Commission deprived Petitioner of its statutory hearing rights. Section 309(a) of the Communications Act provides:

> [I]f the Commission, upon examination of [a Title III radio] application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (emphasis added). Section 309(e) further provides:

> If, in the case of any application . . . a substantial and material question of fact is

> presented or the Commission for any reason is unable to make the finding specified in such subsection, *it shall formally designate the application for hearing*. . . . Any hearing subsequently held upon such application shall be *a full hearing in which the applicant . . . shall be permitted to participate*.

47 U.S.C. § 309(e) (emphasis added).

These statutory provisions apply to applications for consent to assign or transfer control of licenses as well as applications to initially authorize facilities or to renew or modify licenses. Section 309(e) governs "any application to which subsection (a) . . . applies, and Section 309(a), in turn, applies to "each application . . . to which section 308 of this title applies." 47 U.S.C. § 309(a) & (e). Section 310(d), moreover, expressly makes Section 309 applicable to assignment and transfer applications. 47 U.S.C. § 310(d). See, generally, Sewell, Stephen F., *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 287-288 & 290-294 (1991).[4]

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4. Section 310(d) does, however, expressly exclude assignment and transfer applications from the scope of any comparative consideration under the *Ashbacker* doctrine, *Ashbacker Radio Corp. v.FCC*, 326 U.S. 327 (1945): "[T]he Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." 47 U.S.C. § 310(d).

Petitioner could have filed an application for a new license, coupled with the existing licensee's consent to the proposed "short-spacing" of co-channel stations and commitment to later cancel its own license. It is unfairly discriminatory Petitioner to be penalized for seeking to implement by license assignment process precisely the same transactions that others are permitted to do by the short-spacing consent plus license cancellation scheme.[5] The two methods not only accomplish the same result, they do so in a virtually identical procedural manner.[6] In every substantive and significant way they are indistinguishable from one another, and should not therefore be treated differently. The decisions below are thus at odds with fundamental principles of fairness, due process, and equal protection.

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5. The Commission recognizes and freely endorses the use of short-spacing consent agreements as a valid regulatory and licensing mechanism in the land mobile radio services. *E.g.*, *Daniel R. Goodman, Receiver*, 13 FCC Rcd 21944, 21968-21970 (1998); *Hawaiian Wireless Partners*, 11 FCC Rcd 21192, 21994 n.11 (WTB 1996); *Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees*, 6 FCC Rcd 4929 (1991).

6. As previously discussed, the FCC Form 574 forming the assignee's portion of an assignment of license application is virtually indistinguishable in any significant respect from the FCC Form 574 submitted to apply for a new authorization. As to the existing licensee's end of the transaction, a contractual undertaking to cancel the authorization in favor of the new license is substantively equivalent to the assignor's certification, on FCC Form 1046, the "authorization will be submitted to the Commission for cancellation," thereby enabling the assignee to "continue the activity" previously authorized by the cancelled instrument. Indeed, the instructions for completing the FCC Form 574, App. 78a, allow assignment application the option of using a Form 1046 or a letter.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED MAY 23, 2008

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 2008 Decided May 23, 2008

Nos. 03-1072

JAMES A. KAY, Jr.,

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

Consolidated with 05-1290

Appeals of Orders of the
Federal Communications Commission

Before: TATEL, GARLAND and KAVANAUGH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: In 1991, the Federal Communications Commission granted a five-year, private land mobile radio station license to Francisco

Padilla. That same year, it granted a similar five-year license to Vince Cordaro. James Kay reached agreements with Padilla and Cordaro for them to assign their licenses to him. Kay then filed assignment applications with the Commission. But Padilla and Cordaro did not apply to renew their five-year licenses, and the Commission failed to act on Kay's assignment applications before the Padilla and Cordaro licenses expired in 1996. The Commission then dismissed Kay's assignment applications because an expired license cannot be assigned. *See In re Transit Mix Concrete & Material Co.*, 16 F.C.C.R. 15,005, 15,006 ¶ 2, 15,007 ¶ 5 (2001).

Kay petitioned the Commission to review the dismissals. The Commission denied his petitions, reasoning that neither Padilla nor Cordaro had filed "a timely renewal application" and that "a pending assignment application does not extend the expiration date of an underlying Commission license." *In re Kay*, 18 F.C.C.R. 2366, 2367 ¶ 5 (2003) (Kay-Padilla); *In re Kay*, 18 F.C.C.R. 7585, 7586 ¶ 5 (2003) (Kay-Cordaro). The Commission explained that Padilla and Cordaro should have renewed their licenses before the licenses expired if they intended to assign them to Kay.

Before this Court, Kay maintains that the Commission should have considered his assignment applications despite the expiration of the licenses. He relies on the Administrative Procedure Act, which says in relevant part: "When the licensee has made timely and sufficient application for a renewal or a new license

in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558(c); *see also PanAtl. S.S. Corp. v. Atl. Coast Line R.R. Co.*, 353 U.S. 436, 439, 77 S.Ct. 999, 1 L.Ed.2d 963 (1957). In Kay's view, because he filed timely applications for assignments of the licenses before they expired, § 558(c) prevented the licenses from expiring until the agency ruled on his assignment applications.

Kay's argument flouts the plain text of the APA. By its terms, the statute does not apply to him—first, because he is not a "licensee," and second, because he did not apply for "a renewal or a new license." Rather, he is a potential assignee who applied for assignments of existing licenses. *Cf. Miami MDS Co. v. FCC*, 14 F.3d 658, 659-60 (D.C.Cir. 1994) ("The policy behind the third sentence of [§ 558(c)] is that of protecting those persons who already have regularly issued licenses. . . .") (internal quotation marks and emphasis omitted).

Resisting the plain text of § 558(c), Kay argues that there is "virtually no significant difference between an assignment of license application and an application for a new license." Kay Br. at 13. But the text of § 558(c) refers only to applications for license renewals and new licenses, which are distinct from applications for license assignments. And the basic problem for Kay's argument is that, as the Supreme Court has emphasized time and again, courts have no authority to rewrite the plain text of a statute. *See, e.g., Arlington Central Sch. Dist. Bd.*

of Educ. v. Murphy, 548 U.S. 291, 126 S.Ct. 2455, 2459, 165 L.Ed.2d 526 (2006); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). Section 558(c) of the APA is not exempt from this general principle of statutory interpretation.

Section 558(c) prevents the unfairness that would result if agency delay caused a licensee to lose a license despite having filed a timely renewal application. *See Miami MDS Co.*, 14 F.3d at 659-60. But there is no unfairness in the assignment context because a potential assignee may simply demand, as a condition of the assignment contract, that the potential assignor (the license holder) seek a timely renewal from the Commission. That is what Kay should have done here; his quarrel is properly with Padilla and Cordaro, not the Commission.*

Affirmed.

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* Kay also argues that 47 U.S.C. § 310(d) requires assignment applications to be treated the same as new-license applications, and that the Commission's failure to treat them the same was discriminatory. Because Kay did not raise those arguments before the Commission, this Court does not have jurisdiction to consider them. *See* 47 U.S.C. § 405(a); *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C.Cir.2007).

APPENDIX B — ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED JUNE 28, 2005

Federal Communications Commission

FCC 05-131

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 666672

In the Matter of

JAMES A. KAY, JR.

Application for Consent to Assign the License For Conventional SMR Station WNXR890 Newbury Park, California

ORDER

Adopted: June 23, 2005 **Released: June 28, 2005**

By the Commission:

I. INTRODUCTION

1. We have before us a second Application for Review filed by James A. Kay, Jr. (Kay) on March 18,

2004 (Second Application for Review).[1] Kay's Second Application for Review seeks review of an order released on February 20, 2004, by the former Commercial Wireless Division (Division)[2] denying Kay's petition seeking reconsideration of the Commission's *Memorandum Opinion and Order* (*Commission Order*).[3] The *Commission Order* denied Kay's first Application for Review and affirmed the dismissal of the above-captioned assignment application.[4] For the reasons discussed below, we affirm the Division's dismissal of Kay's petition seeking reconsideration of the *Commission Order* and dismiss Kay's Second Application for Review as moot.

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1. Second Application for Review, filed by James A. Kay, Jr. (Mar. 18, 2004).

2. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order on Reconsideration*, 19 FCC Rcd 2938 (MD 2004). In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. Many of the mobile radio services licensing issues formerly under the Bureau's Commercial Wireless Division, including Part 90 conventional Specialized Mobile Radio (SMR) operations, are now under the purview of the Bureau's Mobility Division. *See* FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003).

3. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Memorandum Opinion and Order*, 18 FCC Rcd 7585 (2003).

4. Application for Review, filed by James A. Kay, Jr. (Dec. 14, 2001).

Appendix B

II. BACKGROUND

2. On May 6, 1994, Kay filed an application seeking approval of the assignment of the license for conventional Specialized Mobile Radio (SMR) Station WNXR890 from Vince Cordaro (Cordaro) to Kay. On November 4, 1996, Cordaro's license expired because Cordaro failed to submit a license renewal application.[5] On September 24, 2000, the Division's Licensing and Technical Analysis Branch (Branch) dismissed Kay's assignment application because the underlying license for Station WNXR890 had expired.[6]

3. Kay filed his first petition on November 3, 2000, seeking reconsideration of the Branch dismissal of his assignment application (First Petition).[7] On November 14, 2001, the Division denied Kay's First Petition and

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5. Under former rule Section 90.149(b), effective at the time Kay filed his assignment application, if a licensee failed to file a renewal application, the license was deemed to have automatically cancelled on the date specified on the authorization. 47 C.F.R. § 90.149(b) (1995). The currently effective rule, Section 1.955(a)(1), is not substantively different from the rule effective at the time Kay filed his assignment application. 47 C.F.R. § 1.955(a)(1) (providing that "[a]uthorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed").

6. Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000).

7. Petition for Reconsideration, filed by James A. Kay, Jr. (Nov. 3, 2000).

affirmed the Branch's dismissal of the assignment application.[8] The Division found that the filing of an assignment application does not relieve a Commission licensee of the responsibility to renew its license, and that Cordaro could not assign an expired license.[9] The Division also rejected Kay's argument that his assignment application was protected from dismissal under Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), which permits an existing licensee to continue to operate while its renewal application is pending.[10] On December 14, 2001, Kay filed his first Application for Review, incorporating by reference the arguments from his First Petition.[11] The Commission denied the Application for Review, citing precedent that a pending assignment application does not extend the expiration date of an underlying Commission license.[12] Because an expired license cannot be assigned, and Cordaro had failed to renew his license

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8. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order*, 16 FCC Rcd 20183 (CWD 2001) (*First Division Order*).

9. *Id.* at 20184, ¶ 5.

10. *Id.* at 20184-85, ¶ 6.

11. Application for Review at 1.

12. *Commission Order*, 18 FCC Rcd at 7586, ¶ 5 (citing In the Matter of James A. Kay, Jr., Application for Modification of and Consent to the Assignment of the License for Business Radio Service Station WIK902, *Order*, 18 FCC Rcd 2366 (2003) (*Kay-Padilla*)).

for Station WNXR890 while the assignment application was pending, the Commission concluded that the Branch correctly applied its rules when it dismissed the assignment application.[13] The Commission also found no merit in Kay's allegations that staff bias motivated the delay in processing his application. Rather, the Commission explained that the delay in acting on Kay's assignment application was the result of Kay's being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee.[14]

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13. *Commission Order*, 18 FCC Rcd at 7586-87, ¶ 5. The Commission further dismissed Kay's arguments that Section 9(b) of the Administrative Procedure Act protected his application from dismissal. *Id.* at 7587, ¶ 6. Section 9(b) provides, in relevant part, that "[w]hen the licensee has made timely and sufficient application for a renewal or new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 47 U.S.C. § 558(c). The Commission explained that Section 9(b) applies to renewal and new applications, not to assignment applications, and rejected the notion that a license assignment should be treated as synonymous to an initial grant or a license renewal for purposes of this statutory provision. Consistent with prior decisions, the Commission found that Section 9(b) did not apply in this case. *Commission Order*, 18 FCC Rcd at 7587, ¶ 6.

14. *Commission Order*, 18 FCC Rcd at 7587, ¶ 8 (citing *Kay-Padilla*, 18 FCC Rcd at 2366, ¶ 3, n.5). The Commission explained that with respect to bias, Kay presented no evidence whatsoever that the Bureau's delay in acting on Kay's application was the result of staff bias. *Id.* Moreover, the Commission emphasized that Kay's bias argument overlooked the fundamental fact that it was Cordaro's failure to file for renewal, not the staff's inaction on the assignment application that caused the license for station WNXR890 to expire. *Id.*

4. Kay filed a second Petition on May 19, 2003, seeking reconsideration (Second Petition) of the *Commission Order* only on the issue of delay.[15] On February 20, 2004, the Division dismissed Kay's Second Petition as repetitious, finding that Kay's argument did not rely on any new facts or changed circumstances as required under Commission rules.[16] We now turn our attention to Kay's Second Application for Review.

III. DISCUSSION

5. In his Second Application for Review, Kay contends that without a ruling by the full Commission on his Second Petition, he will be deprived of the opportunity for judicial review in this proceeding, because his only option for seeking that review would be to file an appeal of the Division's *Order on Reconsideration*, which a court would dismiss as premature.[17] Kay further argues that the Division had no delegated authority to rule on his Second Petition and that he is entitled under Sections 5(c) and 405(a) of the Communications Act, as amended,[18] to independent

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15. Petition for Reconsideration, filed by James A. Kay, Jr. (May 19, 2003).

16. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order on Reconsideration*, 19 FCC Rcd 2938, 2939, ¶ 4 (MD 2004) (*Second Division Order*) (citing 47 C.F.R. § 1.106(b)(2)).

17. Second Application for Review at 2.

18. 47 U.S.C. §§ 155(c) and 405(a).

Commission review of that Petition.[19] After full consideration of this case, we find that Kay, for the reasons specified in the Division's *Order on Reconsideration* of the *Commission Order*, failed to satisfy the Section 1.106(b)(2) requirements for seeking reconsideration of the *Commission Order* because Kay failed to support his arguments with any new facts or unknown facts or circumstances that changed after he filed his Application for Review.[20] Accordingly, we affirm the Division's dismissal of Kay's Second Petition. In light of this ruling, the issues raised in Kay's Second Application for Review are moot, and we therefore dismiss that Application.

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19. Second Application for Review at 2-6.

20. 47 C.F.R. § 1.106(b)(2). Section 1.106(b)(2) provides "[w]here the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity." *Id.*

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), 303(r) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), 405, and Sections 1.115(g) and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.115(g) and 1.106, the Commercial Wireless Division's *Order on Reconsideration*, 19 FCC Rcd 2938 (MD 2004), IS AFFIRMED, and the Second Application for Review filed by James A. Kay, Jr. on March 18, 2004, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX C — ORDER ON RECONSIDERATION OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED FEBRUARY 20, 2004

Federal Communications Commission

DA 04-443

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 666672

In the Matter of

JAMES A. KAY, JR.

Application for Consent to Assign the License For Conventional SMR Station WNXR890, Newbury Park, California

ORDER ON RECONSIDERATION

Adopted: February 20, 2004

Released: February 20, 2004

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

Appendix C

I. INTRODUCTION

1. On May 19, 2003, James A. Kay, Jr. (Kay) filed a petition seeking reconsideration (Second Petition)[1] of the Commission's *Memorandum Opinion and Order* (*Commission Order*) affirming the dismissal of the above-captioned assignment application.[2] The *Commission Order* denied Kay's Application for Review[3] of the former Commercial Wireless Division's (Division)[4] order released on December 14, 2001, denying Kay's first petition seeking reconsideration of the dismissal

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1. Petition for Reconsideration, filed by James A. Kay, Jr. (May 19, 2003).

2. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Memorandum Opinion and Order*, 18 FCC Rcd 7585 (2003). On June 23, 2003, Kay filed an Erratum to his Second Petition correcting the citation to the *Commission Order*. Erratum to Petition for Reconsideration, filed by James A. Kay, Jr. (June 23, 2003). In Kay's Second Petition, he cites the *Division Order* as the order for which he is seeking reconsideration, rather than the *Commission Order*.

3. Application for Review, filed by James A. Kay, Jr. (Dec. 14, 2001) (Application for Review).

4. In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. Many of the mobile radio services licensing issues formerly under the Bureau's Commercial Wireless Division, including Part 90 conventional Specialized Mobile Radio (SMR) operations, are now under the purview of the Bureau's Mobility Division. *See* FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003).

of his assignment application (First Petition).[5] For the reasons discussed below, we dismiss Kay's Second Petition as repetitious.

II. BACKGROUND

2. On May 6, 1994, Kay filed an application seeking approval of the assignment of the license for conventional Specialized Mobile Radio (SMR) Station WNXR890 from Vince Cordaro (Cordaro) to Kay. On November 4, 1996, Cordaro's license expired because Cordaro failed to submit a license renewal application.[6] On September 24, 2000, the Division's Licensing and Technical Analysis Branch (Branch) dismissed Kay's assignment application because the license for Station WNXR890 had expired.[7]

3. Kay filed his First Petition on November 3, 2000, seeking reconsideration of the Branch dismissal.[8] On

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5. In the Matter of James A. Kay, Jr. Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California, *Order*, 16 FCC Rcd 20183 (WTB 2001) (*Division Order*).

6. Under former rule Section 90.149(b), if a licensee failed to file a renewal application, the license was deemed to have automatically cancelled on the date specified on the authorization. 47 C.F.R. § 90.149(b) (1996).

7. Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000).

8. Petition for Reconsideration, filed by James A. Kay, Jr. (Nov. 3, 2000).

November 14, 2001, the Division denied Kay's First Petition and affirmed the Branch's dismissal of the assignment application.[9] On December 14, 2001, Kay filed an Application for Review, incorporating by reference the arguments from his First Petition.[10] The Commission denied the Application for Review because an expired license cannot be assigned, and Cordaro had failed to renew his license for Station WNXR890 while the assignment application was pending. The Commission further dismissed Kay's arguments that Section 9(b) of the APA protected his application from dismissal and found that his claims of misrepresentation and bias were without merit. Specifically, the Commission found no merit in Kay's allegations that staff bias motivated the delay in processing his application. Kay filed his Second Petition on May 19, 2003, seeking reconsideration only on the issue of delay.

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9. The Division found that the filing of an assignment application does not relieve a Commission licensee of the responsibility to renew its license, and that Cordaro could not assign an expired license. *Division Order*, 16 FCC Rcd at 20184, ¶ 5. The Division also rejected Kay's argument that his assignment application was protected from dismissal under Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c), which permits an existing licensee to continue to operate while its renewal application is pending. *Division Order*, 16 FCC Rcd at 20184-85, ¶ 6.

10. Application for Review at 1.

Appendix C

III. DISCUSSION

4. We dismiss Kay's Second Petition as repetitious under Section 1.106(b) of the Commission's rules because he fails to support his arguments with any new facts or circumstances that changed after he filed his Application for Review.[11] Kay contends that the Commission's explanation that the uncharacteristic delay in acting on his assignment application was the result of his being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee fails both "factually and legally."[12] Kay argues that his assignment application was not dismissed because of any decision regarding his qualifications to be a Commission licensee, and the delay in processing his application for six years "was tantamount to a denial without a hearing" in violation of the Communications

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11. 47 C.F.R. § 1.106(b). Section 1.106(b)(2) of the Commission's Rules provides that where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: "(i) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (ii) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity." *Id.* § 1.106(b)(2). Section 1.106(b)(3) provides that "[a] petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious." *Id.* § 1.106(b)(3).

12. Second Petition at 1-2.

Act, as amended.[13] Kay further argues that only his licenses, not this application, were designated for hearing for revocation, and that not dismissing his application shortly after the underlying license expired precluded him from applying for a new license for the same facilities.[14] Kay's reiteration of his argument that because of the delay in processing, the Commission must reinstate his assignment application does not rely on any new facts or changed circumstances as required under Commission rules. We therefore dismiss Kay's Second Petition as repetitious.

5. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Sections 0.331 and 1.106(b) of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.106(b), the Petition for Reconsideration filed by James A. Kay, Jr. on May 19, 2003, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

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13. Second Petition at 2.

14. Second Petition at 2-3.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED APRIL 17, 2003

Federal Communications Commission

FCC 03-84

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 666672

In the Matter of

JAMES A. KAY, JR.

Application for Consent to Assign the License For Conventional SMR Station WNXR890, Newbury Park, California

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 2003 **Released: April 17, 2003**

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (Application) filed by James A. Kay, Jr. (Kay) on

December 14, 2001.[1] The Application seeks review of an Order released by the Commercial Wireless Division (Division) on November 14, 2001,[2] denying a Petition for Reconsideration (Petition) filed by Kay on November 3, 2000.[3] The Division affirmed the decision of its Licensing and Technical Analysis Branch (Branch), which dismissed Kay's application seeking to assign the license for station WNXR890 from Vince Cordaro (Cordaro) to Kay. For the reasons discussed below, we deny Kay's Application for Review.

II. BACKGROUND

2. On May 6, 1994 Kay filed an application seeking approval of the assignment of the license for conventional Specialized Mobile Radio (SMR) station WNXR890 from Cordaro to Kay. On November 4, 1996, Cordaro's license expired because Cordaro failed to submit a license renewal application.[4] On September 24, 2000, the Branch

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1. Application for Review filed by James A. Kay, Jr. (Dec. 14, 2001) (Application).

2. *In re* Application of James A. Kay, Jr. for Consent to Assign the License For Conventional SMR Station WNXR890, Newbury Park, California, *Order*, 16 FCC Rcd 20183 (2001) (*Division Order*).

3. Petition for Reconsideration filed by James A. Kay, Jr., File No. 666672 (Nov. 3, 2000) (Petition).

4. Under former rule section 90.149(b), if a licensee failed to file a renewal application, the license was deemed to have automatically cancelled on the date specified on the authorization. 47 C.F.R. § 90.149(b) (1996).

dismissed Kay's assignment application because the license for station WNXR890 had expired.[5]

3. Kay filed a Petition for Reconsideration on November 3, 2000. First, Kay contended that the pendency of his assignment application extended the effectiveness of the underlying license, and thus his application should have been processed notwithstanding the fact that the license expiration date had passed.[6] Second, Kay argued that the Branch's decision to dismiss his assignment application should be set aside because the *Dismissal Notice* used the term "recently" to describe the expiration of a license that had occurred four years previously.[7] Third, Kay argued that the staff's failure to act on his application in a timely manner was motivated by bias and caused the dismissal of his application.[8]

4. On November 14, 2001, the Division denied Kay's Petition and affirmed the Branch's dismissal of Kay's assignment application.[9] The Division found that the filing of an assignment application does not relieve a

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5. Notice of Application Dismissal, File No. 666672 (dated Sept. 25, 2000) (*Dismissal Notice*).

6. Petition at 2-3.

7. Petition at 1-2.

8. Petition at 4-6.

9. *Division Order*, *supra* note 2.

Commission licensee of the responsibility to renew its license, and that Cordaro could not assign an expired license.[10] The Division also rejected Kay's argument that his assignment application was protected from dismissal under Section 9(b) of the Administrative Procedure Act (APA),[11] which permits an existing licensee to continue to operate while its renewal application is pending.[12] On December 14, 2001, Kay filed an Application for Review, incorporating by reference the arguments in the Petition, and asked the Commission to review the arguments *de novo*.[13]

III. DISCUSSION

5. As an initial matter, we note that most of the arguments raised in this case are identical to arguments that Kay previously raised and we rejected in the recently decided-*Kay-Padilla* case.[14] As we held in *Kay-*

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10. *Division Order*, 16 FCC Rcd at 20184, ¶ 5.

11. 5 U.S.C. § 558(c).

12. *Division Order*, 16 FCC Rcd at 20184-85, ¶ 6.

13. Application for Review at 1.

14. In the Matter of James A. Kay, Jr., Application for Modification of and Consent to the Assignment of the License for Business Radio Service Station WIK902, *Order*, FCC 03-27 (rel. Feb. 11, 2003) *(Kay-Padilla)*. In *Kay-Padilla*, Kay filed an assignment application in 1994, the underlying license expired while the assignment application was pending because the licensee failed to file a renewal application, and the assignment application was dismissed in 2000.

Padilla, a pending assignment application does not extend the expiration date of an underlying Commission license.[15] A Commission licensee remains subject to our rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.[16] As the licensee for station WNXR890, Cordaro was responsible for filing a renewal application notwithstanding the pending assignment application. As a result of Cordaro's failure to renew his authorization – a fact that Kay does not dispute – the license for station WNXR890 expired on its own terms. Because an expired license cannot be assigned,[17] the Branch correctly

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15. *Kay-Padilla*, FCC 03-27 at ¶ 5. We also note that, in other proceedings, Kay himself has argued that an assignment application for an expired license cannot be granted. *See* In the Matter of A-1-A Repeater Company, *Memorandum Opinion and Order*, 16 FCC Rcd. 9748, ¶¶ 5, 7 (2001) (granting Kay's Application for Review and setting aside the Branch's consent to the assignment of a cancelled license).

16. *See* In the Matter of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 15,016, ¶¶ 5, 6 (2001); In the Matter of Applications of Robert D. Ryan, *Order on Reconsideration*, 2002 WL 1798576, ¶ 8 (PSPWD 2002). *See also* Biennial Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd. 11,476, ¶ 21 (1999).

17. *Kay-Padilla*, FCC 03-27 at ¶ 5, n.14.

applied our rules when it dismissed the assignment application.

6. We also disagree with Kay's contention that his assignment application is protected from dismissal under Section 9(b) of the APA. Section 9(b) provides, in relevant part, that "[w]hen the licensee has made timely and sufficient application for a renewal or new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."[18] As we stated in *Kay-Padilla*, Section 9(b) applies to renewal and new applications, not to assignment applications, and we reject the notion that a license assignment should be treated as synonymous to an initial grant or a license renewal for purposes of this statutory provision.[19] Consistent with the decision in *Kay-Padilla*, the Division correctly determined that Section 9(b) does not apply here.

7. We find that Kay's claims of misrepresentation and bias are also without merit. Specifically, Kay takes issue with language in the September 2000 *Dismissal Notice* describing the station license as "recently" expired, which Kay regards as evidence of bias because

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18. 5 U.S.C. § 558(c).

19. *See Kay-Padilla*, FCC 03-27 at ¶ 7. In *Kay-Padilla*, the Commission stated that it has been previously found that a license that expires on its own terms is not protected under Section 9(b) of the APA. *Id.* at ¶ 7 (citing *Atlantic Richfield Co. v. United States*, 774 F.2d 1193 (D.C. Cir. 1985)).

the license expiration date had actually occurred four years earlier and thus was not "recent."[20] The *Dismissal Notice* sent to Kay was computer-generated as a result of routine Universal Licensing System (ULS) processing and does not evidence staff bias. The use of the term "recently," while not an accurate characterization given the timing of the notice, was unintended and had no substantive effect on the dismissal of Kay's application. The dismissal occurred because the license for station WNXR890 had expired, and the disputed language is, therefore, immaterial.

8. We also find no merit in Kay's general allegations that delay in the processing of his application was motivated by bias or that any such delay caused the license to expire and thereby affected the outcome of this proceeding.[21] With respect to bias, Kay has presented no evidence whatsoever that the Bureau's delay in acting on Kay's application was the result of staff bias. As noted in

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20. Petition at 1-2.

21. We have rejected Kay's similar allegations of staff bias in other cases. *See, e.g.*, In the Matter of S&L Teen Hospital Shuttle, *Order on Reconsideration*, 17 FCC Rcd. 7899, ¶ 3 (2002) (finding that the Commission had already resolved Kay's allegation of staff bias in the underlying Memorandum Opinion and Order when it found that inadvertent procedural errors had occurred, not bias on the part of staff) (citing In the Matter of S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd. 8153, ¶ 5 n.13 (2001)). *See also* James A. Kay, Jr., *Decision*, 17 FCC Rcd. 1834, ¶¶ 88-91 (finding no basis for concluding that the Wireless Telecommunications Bureau engaged in misconduct in prosecuting the revocation hearings of Kay and Marc Sobel).

Kay-Padilla, the Bureau's uncharacteristic delay in acting on Kay's assignment applications was the result of Kay's being the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee.[22] Moreover, Kay's bias argument overlooks the fundamental fact that it was Cordaro's failure to file for renewal, not the staff's inaction on the assignment application, that caused the license for station WNXR890 to expire. It is well-established that licensees are responsible for submitting renewal applications in a timely manner.[23]

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22. *Kay-Padilla*, FCC 03-27 at ¶ 3, n.5 (citing Connex Freight, *Order on Reconsideration*, 15 FCC Rcd 13345, 13345 at¶ 2 (WTB 2000)). In 2002, the Bureau disposed of 77 percent of assignment applications within 90 days, 95 percent within 180 days, and 99 percent within one year.

23. *See, e.g.*, In the Matter of Applications of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 15,016, ¶ 5 (2001) (holding that "[e]ach licensee is solely responsible for knowing the terms of its license and submitting a renewal application in a timely manner"); In the Matter of the Application of Sierra Pacific Power Company, *Order*, 16 FCC Rcd. 188, ¶ 6 (PSPWD 2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); In the Matter of Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, 15 FCC Rcd. 24,547, ¶ 10 (PSPWD 2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of [its] license application in a timely manner"). *See also* Biennial Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd. 11,476, ¶ 21 (1999).

Because Cordaro failed to file a renewal application, the license expired on its own terms, and, therefore, as we stated above, there was nothing to assign. Accordingly, we deny Kay's Application for Review.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by James A. Kay, Jr. on December 14, 2001, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX E — ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED NOVEMBER 14, 2001

Federal Communications Commission

DA 01-2634

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 666672

In re Application of

JAMES A. KAY, JR.

For Consent to Assign the License
For Conventional SMR Station WNXR890
Newbury Park, California

ORDER

Adopted: November 9, 2001

Released: November 14, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. This order addresses a petition for reconsideration ("Petition") filed by James A. Kay, Jr. ("Kay") on November 3, 2000. Kay seeks reconsideration of the dismissal of the above-captioned assignment application

by the Commercial Wireless Division's Licensing and Technical Analysis Branch ("Branch"). For the reasons discussed below, we deny Kay's Petition.

2. On May 6, 1994, Kay filed an application seeking Commission approval of the assignment of the station license for conventional SMR call sign WNXR890 from Vince Cordaro ("Cordaro") to Kay. Cordaro's license expired while the assignment application was pending for failure to renew on or before the license expiration date of November 4, 1996.[1] On September 24, 2000, the Branch dismissed Kay's assignment application because the underlying license had expired.

3. In his Petition, Kay argues that expiration of the underlying license does not justify the dismissal of a pending assignment application for that license.[2] Kay further argues that section 9(b) of the Administrative Procedure Act (APA)[3] requires that Kay's assignment application be treated as an application for a new license, and that the authorization for the underlying license continued in effect until final action was taken on the assignment application.[4]

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1. *See* Commission Rule 90.149(b), 47 C.F.R. § 90.149 (c) (1996), which provided that "[i]f no application for reinstatement has been filed as specified in this part, the authorization shall be deemed to have been automatically cancelled on the date specified on the authorization."

2. Petition at 2.

3. *See* 5 U.S.C. § 558.

4. *Id.* at 3.

4. We find Kay's arguments to be without merit. Under the Commission's rules in effect at the time of the expiration of call sign WNXR890, renewal applications were required to be filed during the term of the license[5] and licensees were afforded an additional thirty days after the expiration of the license term to apply for reinstatement.[6] If no application for reinstatement was filed, the license was deemed to have been automatically cancelled on the date specified on the authorization.[7] Requests for reinstatement filed more than thirty days after license expiration were reviewed on a case-by-case basis under our waiver rules.[8]

5. In the instant case, Cordaro failed to file for renewal for call sign WNXR890, did not request reinstatement of his license, and did not seek a waiver of the Commission's late-filed reinstatement provision. Further, neither Kay nor Cordaro sought reconsideration of the Commission's action in deleting Cordaro's expired call sign WNXR890. It is well settled that a license remains subject to our rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.[9] The filing of an assignment

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5. 47 C.F.R. § 1.926(b) (1996).

6. 47 C.F.R. § 90.149(a) (1996).

7. 47 C.F.R. § 90.149(b) (1996).

8. 47 C.F.R.§ 90.151(a) (1996).

9. *See* In the Matter of Peacock's Radio and Wild's Computer Service, Inc., and 21st Century Wireless Group, Inc., *Memorandum Opinion and Order*, FCC 01-213 (rel. August 1, 2001).

application does not relieve a Commission licensee of the responsibility of renewing its authorization and Cordaro, a former licensee, cannot assign an expired license.[10] Kay fails to cite any Commission precedent to support his argument that an expired license may be assigned.

6. We also find Kay's argument that section 9(b) of the APA applies to be misplaced. Kay cites section 558(c), which provides, in pertinent part, that "[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." Kay argues that the Commission erred in not treating his assignment application regarding call sign WNXR890 as a "new" application for the facilities associated with Cordaro's expired license, as Kay was allegedly eligible for the specified facilities. On its face, Kay's application does not seek approval for operation of a new facility; rather, Kay seeks Commission approval of the assignment and modification of a previously authorized station.[11] Further, Kay misinterprets the requirements

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10. *See* In the Matter of Applications of Transit Mix Concrete and Material Company, *Memorandum Opinion and Order*, FCC 01-210 (rel. August 2, 2001).

11. Assuming, *arguendo*, that Kay had submitted a new co-channel application requesting authority for the identical parameters as call sign WNXR890, such an application would not have been grantable unless Cordaro failed to load his conventional SMR station with 70 mobile units within eight months of grant.

of section 558(c). The portion of section 558(c) cited by Kay was intended "to protect those persons who already have regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of a license before the agency finds time to pass upon its renewal."[12] The term "regularly issued licenses" has been clarified by the courts to "suggest an activity that is normally carried on indefinitely under licenses that as a regular matter are renewed or replaced with new licenses issued to the current holder."[13] Kay's argument fails in the context of the issuance of a Commission license like that of Cordaro's former call sign WNXR890, which can be renewed by the licensee and is not replaced with a new license issued to the current holder. Under section 558(c), the Commission is required to permit a current licensee to continue to operate while its renewal application is pending. In the instant case, no such renewal application was filed and, accordingly, Kay's assignment/modification application was properly dismissed.

7. Accordingly, IT IS ORDERED that, pursuant to section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (405), and sections 0.331

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12. *See Miami MDS Company v. Federal Communications Commission*, 14 F.3d 658, 659, 304 U.S. App. D.C. 360, 361 (1994), quoting *Pan- Atlantic Steamship Corp. v. Atlantic Coast Line*, 353 U.S. 436, 444-45, 77 S.Ct. 999, 1004-1005 (1957) (Burton, J., dissenting), quoted in *County of Sullivan v. Civil Aeronautics Board*, 436 F.2d 1096, 1099 (2d Cir. 1971) (Friendly, J.).

13. *Id.*

and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the petition for reconsideration filed by James A. Kay, Jr. on November 3, 2000, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

APPENDIX F — ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED FEBRUARY 11, 2003

Federal Communications Commission

FCC 03-27

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 0000415304

In the Matter of the Application of

JAMES A. KAY, JR.

Application for Modification of and for Consent to the Assignment of the License for Business Radio Service Station WIK902

ORDER

Adopted: February 3, 2003

Released: February 11, 2003

By the Commission:

1. *Introduction.* We have before us an Application for Review (AFR) filed by James A. Kay, Jr. (Kay) on May 1, 2002.[1] The AFR seeks review of the denial of

1. James A. Kay, Jr. Application for Review (filed May 1, 2002) (AFR).

Appendix F

Kay's Petition for Reconsideration filed January 2, 2001 by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division).[2] The Division affirmed the decision of its Licensing and Technical Analysis Branch (Branch), which dismissed an application seeking to assign and modify Station WIK902, Los Angeles, California, from Francisco Padilla (Padilla) to Kay.[3] For the reasons discussed herein, we deny the AFR.

2. *Background.* On June 13, 1991, the Commission authorized Padilla to operate Station WIK902.[4] On April 11, 1994, Padilla filed an application seeking to assign the license for Station WIK902 to Kay. Concurrently with the Padilla assignment application, Kay sought to modify the license of station WIK902. The license for Station WIK902 was scheduled to expire by its terms on June 13, 1996. On June 13. 1996, the assignment and modification applications were still pending; however, no renewal application for Station WIK902 was filed on

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2. James A. Kay, Jr. Petition for Reconsideration (filed January 2, 2001) (Petition). Kay subsequently filed a supplement to the Petition. James A. Kay, Jr. Supplement to Petition for Reconsideration (filed January 3, 2001).

3. Applications of James A. Kay, Jr., For Modification of Stations WNQK532, WIJ992, WIJ893, and WII621 and Assignment of Station WIK902, *Memorandum Opinion and Order*, 17 FCC Rcd 5951 (WTB PSPWD 2002) *(Regents MO&O)*. This *MO&O* was adopted on March 29, 2002, and released on April 1, 2002.

4. Station WIK902 was authorized to provide service on frequencies 471.6375 MHz and 474.6375 MHz.

or before that date. As a result, the license for Station WIK902 expired.

3. On December 4, 2000, a computer generated dismissal letter was sent to Kay via the Commission's Universal Licensing System (ULS).[5] The letter noted that "[t]he license for which this application has been filed has recently expired."[6]

4. On January 2, 2001, Kay filed a Petition for Reconsideration of the Branch's dismissal of the above-captioned application.[7] On April 1, 2002, the Division denied Kay's Petition for Reconsideration as to Station WIK902.[8] The Division affirmed the Branch's dismissal of the subject application because the underlying authorization for Station WIK902 was not timely

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5. This uncharacteristic delay in acting on the application was due to the fact that Kay was the subject of a pending hearing proceeding regarding his fitness to be a Commission licensee. *See, e.g.*, Connex Freight, *Order on Reconsideration*, 15 FCC Rcd 13345, 13345 ¶ 2 (WTB PSPWD 2000). Under current procedures, uncontested assignment applications ordinarily are processed within thirty to forty-five days.

6. *See* Automated Dismissal Letter (FCC Form 699) to James A. Kay, Jr. for FCC File No. 415304 (dated December 4, 2000). We note that this type of dismissal is automatically and routinely generated when ULS detects pending applications where the underlying license is no longer valid.

7. *See* Petition.

8. *See Regents MO&O*, 17 FCC Rcd at 5952-54 ¶¶ 7-11.

renewed, and found Kay's additional claims without merit.[9] On May 21, 2002, Kay filed the subject AFR.

5. *Discussion.* We note, as an initial matter, that it is axiomatic that an expired license cannot be assigned.[10] While the subject application was pending, Padilla failed to file a timely renewal application for Station WIK902. Thus, the license for Station WIK902 expired. With the expiration of the license, there was no longer a basis for the subject application. There was nothing for Padilla to assign to Kay, and therefore nothing for Kay to modify. Thus, we affirm both the Branch and the Division in their respective decision to dismiss the subject application.

6. In his AFR, Kay submits that Commission review is warranted in accordance with Section 1.115(b)(2)(ii)

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9. Specifically, the Division determined that (a) Kay's application was not a new application, but an assignment application, which was outside of the scope of the provisions of Section 9(b) of the Administrative Procedure Act; (b) the subject license expired on its terms because a timely renewal application was not filed; and (c) Kay's claims of Commission misrepresentation and lack of candor were without merit. *See id.* at 5953-54 ¶¶ 8-11.

10. *See* Applications of Transit Mix Concrete and Material Company; For Assignment of License for Station WNQJ776, Huntsville, Texas; Request for Renewal of License for Station WNQJ776, Huntsville, Texas, *Memorandum Opinion and Order*, 16 FCC Rcd 15,005 ¶ 2 (2001).

of the Commission's Rules,[11] by reasserting that the subject application should be deemed an "application for a renewal or a new license" within the meaning of Section 9(b) of the Administrative Procedure Act (APA), which bars the expiration of such license until the status of the application is finally determined.[12] Moreover, Kay reasserts that absent the processing delay, the application should have been granted long before the scheduled expiration of the underlying authorization.[13]

7. We agree with the Division's disposition of this issue. In the *Regents MO&O*, the Division concluded that the subject application was neither for a renewal of a license nor for a new license as contemplated by the APA.[14] The application that was submitted sought only to assign and modify the license for Station WIK902. We find no merit in Kay's assertion that the information happened to be submitted on a different form, placing form over substance. Procedures and specific applications are in place for specific functions. Specifically, in the *Regents MO&O*, the Division concluded that Kay's unsupported assertion that the assignment application should have been considered a

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11. 47 C.F.R. §1.115 (b)(2)(ii) states one of the prongs for Commission consideration of an application for review — that "[t]he action involves a question of law or policy which has not previously been resolved by the Commission."

12. *See* AFR at 1 *citing* 5 U.S.C. § 558(c).

13. AFR at 2.

14. *See Regents MO&O*, 17 FCC Rcd at 5953 ¶ 9.

new facilities application was of no merit and that "by its very terms, the application sought the assignment of an existing license, as opposed to a license for a new station."[15] As such, the Division correctly determined that Section 9(b) of the APA – which refers to renewal and new applications and not assignment applications – does not apply here.[16] Moreover, it has been previously found that a license which expires by its own terms is not protected under Section 9(b) of the APA.[17] Thus, Padilla's license is afforded no review under the APA's terms.[18]

8. *Conclusion.* Thus, for the reasons discussed above, we conclude that the Division's denial on April 1, 2002, of the Kay Petition, filed on January 2, 2001, was correct and should be affirmed. As such, Kay's Application for Review, filed May 1, 2002, is denied.

9. *Ordering Clause.* Accordingly, **IT IS ORDERED** that, pursuant to the authority of Sections 4(i), 5(c), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303, and Section 1.115 of the

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15. *See id.*

16. 5 U.S.C. § 558(b).

17. *See, e.g.*, Atlantic Richfield Co. v. United States, 774 F.2d 1193 (D.C. Cir. 1985).

18. Finally, Bureau delay on Kay's modification/assignment application does not obviate the requirement of due diligence on the part of the underlying licensee of Station WIK902, which included filing a timely renewal application.

Appendix F

Commission's Rules, 47 C.F.R. § 1.115, James A. Kay, Jr.'s Application for Review, filed May 1, 2002, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX G — MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION RELEASED APRIL 1, 2002

Federal Communications Commission

DA 02-739

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC File Nos. 171205, 411671, 412026, 415407, and 415304

In the Matter of Applications of

JAMES A. KAY, JR.

For Modification of Stations WNQK532, WIJ992, WIJ893 and WII621 and Assignment of Station WIK902

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 2002 Released: April 1, 2002

By the Acting Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a petition for reconsideration (Petition) filed by James A. Kay, Jr.

(Kay) on January 2, 2001.[1] Kay requests reconsideration of the decision by the Chief, Licensing and Technical Analysis Branch (LTAB), Public Safety and Private Wireless Division, Wireless Telecommunications Bureau dismissing the above-captioned applications.[2] For the reasons stated below, we grant Kay's Petition with respect to three of the applications, and deny the Petition with respect to the remaining applications.

2. *Background.* Kay filed four modification applications between March 1, 1989 and July 5, 1994, to add frequencies to Business Radio Service Stations WNQK532, WIJ992, WIJ893, and WII621 in and around the Los Angeles, California area (FCC File Nos. 171205, 411671, 412026, 415407). While these applications were pending, Kay filed timely applications to renew the licenses for Stations WNQK532, WIJ992, and WIJ893, which were scheduled to expire on October 2, 1994, August 18, 1994, and November 7, 1994, respectively. The renewal applications remain pending. The license for Station WII621, however, expired on August 21, 1995, because a timely renewal application for this facility was not filed. At this time, the modification application associated with this station (FCC File No. 415407) had not been acted on by the Commission.

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1. James A. Kay, Jr. Petition for Reconsideration, filed January 2, 2001 (Petition). Kay subsequently filed a supplement to the Petition. James A. Kay, Jr. Supplement to Petition for Reconsideration, filed January 3, 2001 (Supplemental Petition).

2. *See* automated dismissal letters (FCC Form 699) to James A. Kay, Jr. dated December 4, 2000 (Dismissal Letter(s)).

3. On April 11, 1994, Francisco Padilla (Padilla) sought to assign the license for Station WIK902, Los Angeles, California to Kay. The license for Station WIK902 was scheduled to expire on June 13, 1996. Concurrently with the assignment application, Kay sought to modify the license of Station WIK902.[3] The license for Station WIK902 expired on June 13, 1996, while the assignment/modification application was still pending, because a timely renewal application for this facility was not filed.

4. On December 4, 2000, five separate computer-generated dismissal letters were sent to Kay through the Commission's Universal Licensing System (ULS) regarding the subject applications.[4] These computer-generated letters noted that "[t]he license for which this application has been filed has recently expired."[5] Kay asks that we reconsider the dismissal of the subject applications and that the applications be reinstated and granted.

5. *Discussion. Stations WNQK532, WIJ992, WIJ893, and WII621.* Kay argues that it was an error for the LTAB to dismiss the modification applications for Stations WNQK532, WIJ992, WIJ893, and WII621,

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3. FCC File No. 415304.

4. Dismissal Letters.

5. *Id.* We note that this type of dismissal letter is automatically and routinely generated when ULS detects pending applications where the underlying license is no longer valid.

because the licenses for these stations have not expired.[6] In this connection, Kay states that "timely renewals were filed" and points to Section 1.62(a)(1) of the Commission's Rules, which requires that a license continues in effect until the Commission reaches a final determination on any timely-filed renewal application for that license.[7] We agree with Kay's interpretation of Section 1.62 of the Commission's Rules and its applicability to the instant matter. Given that Kay filed renewal applications for Stations WNQK532, WIJ992, and WIJ893, that such applications were timely filed, and those applications are still pending, pursuant to Section 1.62 of the Commission's Rules, the licenses for these stations have not yet expired. Therefore, we find that it was erroneous for the LTAB to dismiss the modification applications pertaining to such stations on the basis that the license had expired. Consequently, we will reinstate the modification applications for these three stations *nunc pro tunc.*

6. With respect to Station WII621, however, we believe that a different analysis is necessary to determine the appropriate current status of the

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6. Petition at 2.

7. *Id.* 47 C.F.R. § 1.62(a)(1). *See also* 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."). *See also* Herbert L. Schoenbohm, *Initial Decision*, 11 FCC Rcd 1146, 1146 ¶ 1 (ALJ 1996); Mobilcom Pittsburg, Inc., *Order*, 9 FCC Rcd 509, 509 ¶ 2 (1994).

associated modification application because as noted previously, there is no record of the filing of a renewal application for this station. As a result, the license for station WII621 expired on August 21, 1995. Once this event occurred and became final, there was nothing to modify because the authorization no longer existed.[8] As a result, we believe that the LTAB dismissal of the modification application regarding Station WII621 was ministerial in nature because no action could be taken on the application due to the non-existence of an underlying authorization.[9]

7. *Station WIK902.* Regarding the dismissal of the assignment/modification application for Station WIK902, Kay argues that Padilla timely filed an application to renew prior to Station WIK902's license expiration

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8. *See, e.g.*, James A. Kay, Jr., *Order*, 16 FCC Rcd 20183, 20184-85 (WTB CWD rel. Nov. 14, 2001) (pending application properly dismissed when underlying license expired); Letter to Ms. Cheryl E. Cox of Lone Star from D'wana R. Terry, Federal Communications Commission (dated September 29, 1999), ordering Lone Star to cease operating on frequencies 936.0000/897.0000 MHz, which had been assigned to Lone Star on September 29, 1998, from Waste Management, since the underlying authorization held by Waste Management had been previously set aside on May 19, 1995; *Jeferson Radio Company, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (where the Commission had terminated the authority to operate the radio station, there was no authorization susceptible of being assigned).

9. *See, e.g.*, James A. Kay, Jr., *supra*, 16 FCC Rcd at 20184-85 ¶¶ 5-6.

date.[10] Next, Kay asserts that even if it is determined that no renewal application was filed, the Bureau's lack of candor in this matter requires that its action "be set aside."[11] Kay also claims that the expiration of a license does not justify the dismissal of a pending application for assignment of that license, and finally, that it is the Commission's delay in acting on the assignment application that caused the license for Station WIK902 to expire.[12]

8. Kay's argument that the assignment application for Station WIK902 was incorrectly dismissed is grounded in the claim that "[o]n information and belief, Mr. Padillo timely filed an application to renew" prior to Station WIK902's license expiration date.[13] The Commission's licensing records, however, do not reflect the filing of a renewal application for this station. Consequently, the license expired on June 13, 1996. Accordingly, once the license expired, there was nothing for Padilla to assign to Kay and thus, nothing for Kay to modify.

9. Kay further argues that the expiration of a license does not justify the dismissal of a pending application for assignment of that license. In this regard, Kay claims that his portion of the assignment application should

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10. Supplemental Petition at 2.

11. *Id.* at 3.

12. *Id.* at 6.

13. *Id.* at 2.

have been considered as "an entirely new facilities application prepared in the name of the assignee," and that the filing of such applications cause the underlying license, in accordance with Section 9(b) of the Administrative Procedure Act (APA), to continue in effect pending final action on the application.[14] Kay does not cite any authority in support of his argument, and his interpretation runs counter to Commission precedent that "a proposed assignee has no rights under a station license."[15] Moreover, we reject Kay's argument as inconsistent with the representations contained in the application. By its very terms, the application sought the assignment of an existing license, as opposed to a license for a new station. Section 9(b) of the APA[16] refers to renewal and new applications, not assignment applications, and we reject the notion that they are the same.[17] Therefore, we disagree with Kay's contention that assignment applications are within the express or intended scope of Section 9(b) of the APA.

10. Kay claims that the Bureau's failure to act on the application, rather than the failure of the licensee to file for renewal, caused the license for Station WIK902

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14. *Id.* at 4.

15. *Transit Mix*, 16 FCC Rcd at 15005 ¶ 5.

16. 5 U.S.C. § 558(b).

17. In this regard, we note that in the Communications Act Congress distinguishes between applications for new licenses and assignment applications. *See* Communications Act of 1934, *as amended*, 47 U.S.C. §§ 308 (new, modifications, and renewals) and 310(d) (transfers and assignments).

to expire.[18] Under such circumstances, Kay contends that the dismissal of the assignment application is unfair.[19] We disagree with Kay's assertions. Kay's argument is mistaken in that it propounds that licensees are not required to file timely renewal applications. The Commission has, to the contrary, repeatedly held that licensees are responsible for filing a timely renewal application for their license.[20] In order for an assignment application to be granted, the assignor must have a valid license to assign. Because no renewal application was filed, the license for Station WIK902 expired on its terms on June 13, 1996. Consequently, we find that based on the information before the LTAB when it took the

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18. Supplemental Petition at 6.

19. *Id.*

20. *See, e.g.*, *Transit Mix*, 16 FCC Rcd 15,005, ¶ 5; Sierra Pacific Power Company, *Order*, 15 FCC Rcd 188, 190-91 ¶ 6 (2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, 15 FCC Rcd 24,547, 24,550 ¶ 10 (2000) (holding that "each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of license application in a timely manner"); World Learning, *Order*, 15 FCC Rcd 23,871, 23,872 ¶ 4 (2000) (holding that licensee "is solely responsible for filing a timely renewal application"); First National Bank of Berryville, *Order*, 15 FCC Rcd 19,693, 19,695-96 ¶ 8 (2000) (holding that "it is the responsibility of each licensee to renew its application prior to the expiration date of the license"); and Montana Power Company, *Order*, 14 FCC Rcd 21,114, 21,117 ¶ 7 (1999) (holding that "it is the responsibility of each licensee to apply to renew its license prior to the license's expiration date").

subject action, its dismissal of the assignment application was proper.[21]

11. Finally, Kay asserts that even if it is determined that no renewal application was filed, the "Bureau has misstated the facts by which it attempts to justify the dismissal of the pending assignment application."[22] According to Kay, the dismissal letter's statement that "[t]he license for which this application has been filed has recently expired" reflects an "inexcusable lack of candor."[23] In particular, Kay takes issue with the language "recently expired," because the license expiration date was more than four years prior to the date of the dismissal letter, and thus not recent.[24] Kay maintains that "[f]or this reason alone, the Bureau's action must be set aside."[25] We find that Kay's claims of misrepresentation and lack of candor are without merit. As noted above, the dismissal letters sent to Kay were computer-generated as a result of routine ULS

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21. *See* Letter dated April 5, 2001 from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Robert D. Ryan, *petition for reconsideration pending* (expired license cannot be assigned). We nonetheless note that if such reconsideration were to be granted, we would then need to revisit the procedural posture of the subject assignment/modification application.

22. Supplemental Petition at 2.

23. *Id.*

24. *Id.*

25. *Id.* at 2-3.

processing. Kay's contentions are devoid of any specific facts or information to demonstrate otherwise or to support his allegations of misrepresentation and lack of candor.[26] Consequently, based on the information before us, we conclude that the LTAB did not take any incorrect action with respect to its disposition of the assignment/modification application pertaining to Station WIK902.

12. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.106 and 1.62 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.62, the petition for reconsideration filed by James A. Kay, Jr. on January 2, 2001 IS GRANTED to the extent indicated herein, and is otherwise DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Supplemental Petition for Reconsideration filed by James A. Kay, Jr. on January 3, 2001 IS DENIED.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

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26. We nonetheless recognize Kay's observation that the use of "recently expired" was not a proper characterization under the specific circumstances presented in the instant matter. Thus, we will review the boilerplate language used in such computer-generated letters in the future.

Appendix G

FEDERAL COMMUNICATIONS COMMISSION

Barry J. Ohlson
Acting Chief, Public Safety
and Private Wireless Division
Wireless Telecommunications Bureau

APPENDIX H — NOTICE OF DISMISSAL OF THE FEDERAL COMMUNICATIONS COMMISSION DATED DECEMBER 4, 2000

This is not a true copy of the original letter sent by the FCC to the party referenced below. It is a record of public information contained in the FCC's licensing database. The information contained in this reference copy reflects information contained in the original letter; however, the formatting of the letter, including FCC addresses, telephone numbers, and web sites [urls] may be different.

Federal Communications Commission
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325-7245

NOTICE OF DISMISSAL

KAY JR, JAMES A
PO BOX 7890
VAN NUYS, CA 91409

Date: 12/04/2000
Reference No.: 633016
File No.: 415304
Radio Service: IG
Call Sign: WIK902
Market Area:
FAC#: 940310022

Appendix H

Re: KAY JR, JAMES A

Your application is in a dismissal status effective 12/03/2000 without prejudice in accordance with Section 1.934 of the Commission's Rules for the reason(s) indicated below. If you still wish to be licensed, you must file a new application, fee, FCC Form 159 for feeable applications, and all required showings.

If you are currently operating under authority provided by the Commission's Rules based on your submission of the above referenced application, you must immediately cease operation until such time as you come into compliance with the Rules.

Certain services are subject to mandatory electronic filing pursuant to Section 1.913. For all other services, you may file your application either electronically or manually, but not both. Electronic filing is recommended for the few radio services where manual filing is permitted. For information on how to file an application electronically, visit the Wireless Telecommunications Bureau Web site at http://wireless.fcc.gov/uls. If you wish to file your application manually, forms can be obtained from the FCC's web site @ http://www.fcc.gov/formpage.html, by calling the FCC's Forms Distribution Center 800-418-FORM (800-418-3676), or from Right Fax by dialing (202) 418-0177. For additional assistance, please call (717) 338-2888 or (888) 225-5322 and select option #2.

The license for which this application has been filed has recently expired. Because the license is no longer valid, this application cannot be acted upon.

APPENDIX I — NOTICE OF DISMISSAL OF THE FEDERAL COMMUNICATIONS COMMISSION DATED SEPTEMBER 25, 2000

This is not a true copy of the original letter sent by the FCC to the party referenced below. It is a record of public information contained in the FCC's licensing database. The information contained in this reference copy reflects information contained in the original letter; however, the formatting of the letter, including FCC addresses, telephone numbers, and web sites [urls] may be different.

Federal Communications Commission
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, PA 17325-7245

NOTICE OF DISMISSAL

KAY JR, JAMES A
PO BOX 7890
VAN NUYS, CA 91409

Date: 9/25/2000
Reference No.: 445432
File No.: 666672
Radio Service: GX
Call Sign: WNXR890
Market Area:
FAC#: 941160085

Appendix I

Re: KAY JR, JAMES A

Your application is in a dismissal status effective 09/24/2000 without prejudice in accordance with Section 1.934 of the Commission's Rules for the reason(s) indicated below. If you still wish to be licensed, you must file a new application, fee, FCC Form 159 for feeable applications, and all required showings.

If you are currently operating under authority provided by the Commission's Rules based on your submission of the above referenced application, you must immediately cease operation until such time as you come into compliance with the Rules.

Certain services are subject to mandatory electronic filing pursuant to Section 1.913. For all other services, you may file your application either electronically or manually, but not both. Electronic filing is recommended for the few radio services where manual filing is permitted. For information on how to file an application electronically, visit the Wireless Telecommunications Bureau Web site at http://wireless.fcc.gov/uls. If you wish to file your application manually, forms can be obtained from the FCC's web site @ http://www.fcc.gov/formpage.html, by calling the FCC's Forms Distribution Center 800-418-FORM (800-418-3676), or from Right Fax by dialing (202) 418-0177. For additional assistance, please call (717) 338-2888 or (888) 225-5322 and select option #2.

The license for which this application has been filed has recently expired. Because the license is no longer valid, this application cannot be acted upon.

APPENDIX J — ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC FILED JULY 31, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1072 **September Term 2007**

FCC-03-27

Filed On: July 31, 2008

James A. Kay, Jr.,

Appellant

v.

Federal Communications Commission,

Appellee

Consolidated with 05-1290

BEFORE: Tatel, Garland, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on July 7, 2008, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1072 **September Term 2007**

FCC-03-27

Filed On: July 31, 2008

James A. Kay, Jr.,

Appellant

v.

Federal Communications Commission,

Appellee

Consolidated with 05-1290

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX K — PRINCIPAL STATUTES & REGULATIONS RELIED UPON

Administrative Procedure Act, Section 9(b)
5 U.S.C. § 558(c):

Sec. 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

. . .

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Communications Act, Section 308
47 U.S.C. § 308:

Sec. 308. Requirements for license

(a) Writing; exceptions

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in

furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the

station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(c) Commercial communication

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

Appendix K

(d) Summary of complaints

Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.

Communications Act, Section 309, subsections (a) through (e)
47 U.S.C. § 309(a)-(e):

Sec. 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served

by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or

common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for-

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit

interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(c) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

Appendix K

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast

station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station

license), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted

to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Communications Act, Section 310(d)
47 U.S.C. § 310(d):

Sec. 310. License ownership restrictions

. . .

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license

in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 90.119 of FCC Regulations
(as in effect in 1994)
47 C.F.R. § 90.119 (1994)

Sec. 90.119 Application forms.

The following application forms shall be used—

(a) Form 574 shall be used to apply:

(1) For new base, fixed, or mobile station authorizations governed by this part.

(2) For system authorizations, where the system meets the requirements of § 90.117.

(i) Application for a radio system may be submitted on a single Form 574.

(ii) If the control station(s) will operate on the same frequency as the mobile station, and if the height of the control station(s) antenna(s) will not exceed 6.1 meters (20 feet) above ground or an existing man-made structure (other than an antenna structure), there is no limit on the number of such stations which may be authorized. Items 1 through 5 or Form 574 shall be completed showing the frequency, the station class, the total number of control stations, the emission, and the output power of the highest powered control station. Applicants for all control stations in the 470-512 MHz band must furnish the information requested in Items 1-11 of Form 574.

(3) For modification or for modification and renewal of an existing authorization. (See § 90.135)

(4) For the Commission's consent to the assignment of an authorization to another person or entity. In addition, the application shall be accompanied by a letter from the assignor setting forth his desire to assign all right, title, and

interest in and to such authorization, stating the call sign and location of the station, and that the assignor will submit his current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

(5) For reinstatement of an expired license. See also paragraphs (e)(1) and (h) of this section.

(b) With respect to the 806-824/851-869 and 896-901/935-940 MHz bands, all applications required by this section to be filed on Form 574 shall be accompanied by Form 574-A.

(c) With respect to the frequencies below 27.5 MHz, all applications required by this section to be filed on Form 574 shall be accompanied by Form 574-B.

(d) Applications for stations on frequencies above 27.5 MHz in areas where international coordination is required may be accompanied by Form 574-B, but are not required to be. If the applicant files Form 574-B, the information concerning the proposed station that the Commission reports to the coordinating nation will be that provided on the Form. If the applicant does not file Form 574-B, the information concerning the proposed station that the Commission reports to the coordinating

nation will be based on assumed technical characteristics determined by the Commission and described in instructions to Form 574. Specifically, the following stations are involved:

(1) Those north of Line A, or east of Line C if the application is for a frequency between 30 MHz and 470 and 929 and 930 MHz. Lines A and C are defined in § 90.7.

(2) Those requesting frequencies in the portion of the frequency bands allocated to both countries that overlap in the two geographical areas as defined in the U.S. Canada agreement, dated April 7, 1982, concerning the use of 800 MHz frequencies along the U.S.-Canada border.

(e) Form 405-A shall be used to:

(1) Apply for license renewal (if the reinstatement of renewal does not involve the modification of the station or system license) when the licensee has not received renewal Form 574-R in the mail from the Commission within sixty (60) days of license expiration, and may be used to apply for reinstatement of an expired license (if the reinstatement does not involve the modification of the station or system license).

(2) Notify the Commission of a change in the licensee's name or mailing address that occurs during the license term. (See § 90.135(b).)

(3) Notify the Commission that the licensee has discontinued station operation and wishes to cancel the license. (See § 90.157.)

(f) A separate application shall be submitted on FCC Form 703 whenever it is proposed to change, as by transfer of stock ownership, the control of a corporate licensee.

(g) Form 572, Temporary Permit to Operate a Part 90 Radio Station, should be properly executed if the applicant is eligible and desires to operate his station pending the processing of his formal application (See also §§ 90.159, and 90.657).

(h) Form 574-R shall be used to apply for a renewal of an existing authorization and may be used to apply for reinstatement of an expired license, if the renewal or reinstatement does not involve the modification of the station or system license. (Form 574-R is generated by the Commission and is mailed to the licensee prior to the expiration of the license term).

APPENDIX L — EXCERPTS FROM FCC FORM 574 INSTRUCTIONS (AUGUST 1989)

Federal Communications Commission

Approved by OMB
3060-0128

INSTRUCTIONS FOR COMPLETION OF FCC FORM 574

PRIVATE LAND MOBILE AND GENERAL MOBILE RADIO SERVICES

FCC Form 574 is used to apply for new or modified radio station authorizations in the Private Land Mobile (Part 90) and General Mobile (Part 95) Radio Services. The following instructions tell what information is needed in each item of Form 574. For your convenience, they are numbered the same as the corresponding item numbers on the form. Item 38 (previously FCC 574A) on the revised FCC 574, is required when applying for trunked or conventional systems to operate in the 806-824/851-869 MHz, 896-901/935-940 MHz frequency bands (Subpart S of Part 90).

* * *

GENERAL INSTRUCTIONS

Each item of the FCC Form 574 must be complete, correct and typewritten. If additional space is needed for any item, use additional Forms 574 (with pages numbered), attachments or the reverse side of the application, whichever is appropriate.

* * *

Appendix L

INSTRUCTIONS FOR COMPLETING INDIVIDUAL ITEMS

* * *

Item 32—Reason for Filing

Indicate by placing an (X) in the appropriate box(es) for what purpose you are filing the application.

* * *

Assignment of Authorization

An (X) in this box indicates you request assignment of the right, title, and interest to a station presently authorized to another person or entity. Prepare the application in your own name and complete it in the same manner as for a new station with all questions answered and include a detailed statement of your eligibility for Item 31. Include a letter from the assignor meeting the requirements of the Commission's Rules. For your convenience, FCC Form 1046, "Assignment of Authorization" may be obtained from any Commission office for this purpose. General Mobile radio station licenses may not be assigned.

* * * *